UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION

Master File No. 12-02311

Hon. Marianne O. Battani

ALL PARTS

MOTION HEARINGS

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan

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EXHIBITS: Received
(No exhibits offered)

Detroit, Michigan

Tuesday, March 15, 2016

At about 10:04 a.m.

— — —

(Court, Counsel and parties present.)

THE CASE MANAGER: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

The Court calls In Re: Automotive Parts Multiple District Litigation, 12-2311.

THE COURT: Good morning.

THE ATTORNEYS: (Collectively) Good morning.

THE COURT: I am surprised to see everybody here but welcome. Let's see. Who is -- I guess we know who but we will do appearances. Let's do the first motion, the motion to consolidate and amend.

MS. SULLIVAN: Your Honor, Marguerite Sullivan from Latham Watkins on behalf of Weastec.

Before Mr. Williams' begins his argument, I have one housekeeping matter.

THE COURT: All right.

MS. SULLIVAN: The defendants have divided up the argument among us, and so if we may we would like

Mr. Williams to make his argument, and then all of the defendants can respond, and then he will have an opportunity to reply to all of the arguments that we raise, if that's all right with Your Honor?

THE COURT: When you say all the defendants I just want to make sure I have your defendant groups correct, all right, so if you would go over that?

MS. SULLIVAN: Of course. Well, I represent Weastec, and I will be speaking on behalf of all of the defendants that are subject to this motion.

THE COURT: You did the general motion, as I recall?

MS. SULLIVAN: Correct. And then Anita Stork from Covington Burlington will be speaking for Alps but on behalf of all defendants on other issues, and then Mr. Cherry will be speaking again on behalf of all defendants but on other issues. We have just divided it up by subject matter.

THE COURT: All right. That explains it so when you get up I will take it. Okay.

MS. SULLIVAN: We also have a couple other people that I did not include, Tom Miller will be arguing as well as Bruce Baird.

THE COURT: Now, one thing before we proceed, there are some matters that were sealed. Mr. Williams?

MR. WILLIAMS: Good morning, Your Honor.

Steve Williams on behalf of the end payor plaintiffs, and I believe that the auto dealers may be joining in the arguments I make.

As to the question that the Court just asked, there are some limited matters for which the only parties and counsel who should be in the courtroom would be the defendants, the end payor plaintiffs and the auto dealer plaintiffs, and we would respectfully request for that portion of the argument that the Court order anyone but those parties to leave the courtroom. I will address those points, and then those parties can return. I certainly can't say how the defendants may approach it, but that is what we would ask of the Court.

THE COURT: All right.

MR. WILLIAMS: Also, if I can inquire through the Court of defense counsel to make sure I understand, I think I do, that I will do my opening argument, and then I will respond to all of the defense arguments after they are all done, that is perfectly fine with me. Okay.

THE COURT: Okay. In terms of time, I'm hoping that you can do your argument in a half hour or less.

MR. WILLIAMS: Certainly.

THE COURT: And Defendants, even though you are breaking it down by issue, you don't each get a half hour so you will have to try to -- I don't know how many issues you

are breaking it down to but let's try to keep it obviously as brief as we can. The Court has read these pleadings, these papers, and so we are ready to proceed.

MR. WILLIAMS: Thank you, Your Honor. Certainly, I think given how much paper has been submitted I can give my argument in well less than a half hour.

THE COURT: When we get done with this we will be able to grow a whole forest here, aren't we?

MR. WILLIAMS: If I may then renew respectfully my request to exclude anyone from the courtroom other than the defendants who are parties to this motion, the auto dealers' counsel and any auto dealers' representatives and the end payor counsel and any end payor representative?

THE COURT: All right. I don't know that there is anybody else here but we will -- is that right now then?

MR. WILLIAMS: Please. Thank you.

THE COURT: Okay. The directs will be leaving. Okay. Once you go through this sealed is there part of this argument that they can come back in?

MR. WILLIAMS: Yes, I anticipate this initial part won't take too long.

(All parties not subject to this motion were excused from the courtroom at 10:09 a.m.)

(Courtroom was open to the public at 10:30 a.m.)

MR. WILLIAMS: So as to the continuing allegations, and those are the examples from essentially paragraph 40 through paragraph 81 are specific examples of each of these companies going forth and carrying out the agreement that we have alleged on the micro level. So we have it on the macro level and we have it in the micro level for a prolonged period, and as we stated, Your Honor, these are representative examples, we are not required in a complaint to list every instance that we have of these discussions in

this collusion, but there are hundreds of them that we could have, but we don't think that's what is required for the purposes of this motion or for the purposes of a complaint.

And there are some suggestions in the briefing that, well, you had a different allegation about us before, it is not in there, you must have disavowed it. No, we are not disavowing anything that was in prior complaints.

THE COURT: So you're saying there were separate conspiracies and there is an overarching conspiracy, is that what you're saying?

MR. WILLIAMS: No, we are saying --

THE COURT: You are disavowing what you had in your other --

MR. WILLIAMS: No. What I mean to say is if you read the briefing, as I did yesterday again, that some of the individual defendant made, they will say in the prior complaint you alleged against us you had these allegations but now you just have this one or two so you are walking away from what you allege before in terms of specific communications, discussions and agreements, which we are not. We are simply saying these are representative examples and they show each member's participation in the conspiracy, and we also say under the law of a civil conspiracy we don't have to show that everyone knows who every other participant in the conspiracy is.

THE COURT: So let's say we consolidate -- we amend, not consolidate, we amend and we allow this theory, and you proceed on this theory, it sounds like we have a whole new ball game here which would mean new complaints, new answers, new motions. When do you think this case would proceed to class certification?

MR. WILLIAMS: Your Honor, we have submitted with our reply brief our proposed schedule, and it actually moves things along a lot faster than any other proposals that have been made. If the Court is familiar with the movie Groundhog Day, the only other thing on the table is to keep doing the same thing over and over again for seven or eight or nine years. What we have proposed is a schedule timed from this Court's decision, if this Court were to grant the motion for the briefing of any further motions directed at the complaint, and frankly our view is if the Court were to grant the motion we don't see why a motion to dismiss would be necessary since again reading all of these briefs yesterday every argument about implausibility and Twombly and futility is already in there, but we have a proposed schedule. We then have a schedule that from the time the Court issues its last decision in the three cases that are going class certification we then file our motion to certify this class, and we have a schedule to bring us to not only when that motion is resolved but summary judgment and up to

trial. Our schedule --

THE COURT: Wouldn't you need discovery from all of these defendants that you have named that we haven't even gotten there yet?

MR. WILLIAMS: We would, but we don't see that as an insurmountable burden given what we have learned so far through cooperation and given our experiences in the other cases. We are not novices to these companies anymore, we are not novices to their data or their information, and in other ways we have advanced the case so that we can do this. The OEM discovery motion is set for a hearing next week. The auto dealers and the end payors are all being deposed once for all cases. So we think that this is a point at which it makes most sense to do this because it can be done. And as to all the cases that are a part of this motion, nothing has progressed substantially that any significant effort would be lost, and there is a lot of discussion about, well, there is an initial order, the initial order says very, very little. Now would be the time to start discovery moving in these cases together on the schedule that we have proposed and --

THE COURT: As I recall, we have some cases that aren't even served?

MR. WILLIAMS: Well, what we have, Your Honor, is --

THE COURT: Some parts.

MR. WILLIAMS: -- some foreign defendants who insist on going through Hague process even though their counsel sits in this court at every hearing, even though their American subsidiaries are here at every hearing, even though they are getting reports about the case, those are the ones not served. And I believe this Court ruled long ago at the first hearing we were at you encouraged those to accept service, that we weren't going to wait for you if we go through the Hague, so that's no different now than it was then, but as I said, their counsel are here and the subs are here, so the parties are here in this Court and we can start with discovery.

THE COURT: And ultimately if we should go to trial how would you do that? We would rent Cobo Hall to start with, then what would you do?

MR. WILLIAMS: You would do it like any other antitrust trial. And to step back, we didn't create the facts, the facts are what they are.

THE COURT: I know you didn't create the facts, but we have to deal with the facts. Let's assume we have to proceed to trial, how would you do that with all of these defendants?

MR. WILLIAMS: Your Honor, I think we would do it as we would with any other trial. If the consolidation is admitted and the complaint is filed, those defendants left at

the time of trial would go to trial as part of a conspiracy. Certainly some defendants might --

THE COURT: Some defendants will settle, right, because why would some little defendant take the chance of being jointly and severally responsible for such a verdict if there is a verdict? And we have pleas so we know, with all due respect to defendants, chances are if it gets to trial that there would be some verdicts for defendants.

MR. WILLIAMS: I would think there were, but I think of cases like the LCD in the Northern District which when it did go to trial, of the 15 defendants in the case when it started there was one defendant left, that's who it went to trial against, but we all have to prepare as if we go to trial against every party who doesn't resolve their claims.

THE COURT: Okay. Let's hear from defendants. Ms. Sullivan?

MS. SULLIVAN: Your Honor, I have some slides if I may approach?

THE COURT: Thank you.

MR. WILLIAMS: Do you have additional copies, please?

MS. SULLIVAN: Good morning, Your Honor.

It would be futile and extremely prejudicial to defendants to grant the end payors' and auto dealers' motion

for leave to file this amended complaint and to consolidate these cases.

THE COURT: Why, when they say it is going to be so much easier?

MS. SULLIVAN: It is not going to be easier, Your Honor. It will be a colossal disaster, but I think it is important that I start by setting the stage to explain to you exactly what this complaint is and what it is not.

The plaintiffs have filed more than 30 auto parts cases, as you know, all consolidated in this MDL -- or coordinated in the MDL, and the end payors and the auto dealers are parties in all 30 of them. The direct purchaser plaintiffs, who have not --

THE COURT: Before you go on let me just make this -- ask you this question, which I think is fairly clear but just to be sure, the Court under the rules has the right to consolidate parts or trials as I go as we get to the end. You don't disagree with that?

MS. SULLIVAN: No, that's correct, Your Honor.

THE COURT: And I don't think the plaintiffs disagree with that, that there is that general authority. So now you're addressing what I think is the more important thing, which is the amendment, the new theory, the overarching theory?

MS. SULLIVAN: That's correct.

THE COURT: Okay.

MS. SULLIVAN: So the direct purchaser plaintiffs are not parties to these motions, and they have filed 15 of these auto parts cases. The truck dealer plaintiffs, who also have not joined in these motions, have filed five of these auto parts cases. In most of these cases there is no overlap at all between defendants. Most of the defendants are only in one or two of these cases. The products that are the subject of these cases are all extremely different, they are -- they have no relationship whatsoever, they are completely unrelated. Other than the fact they all go into a car, there is no relationship between them whatsoever.

So the EPPs and ADPs --

THE COURT: But of the cases that they are arguing here Denso is, in fact, a defendant in all of those parts?

MS. SULLIVAN: That's correct. Denso is the only defendant that is a defendant in all of these parts cases. They have basically chosen 18 of the parts cases and allege that these 18, not the rest, but just these 18 are the subject of this overarching single conspiracy that you just heard about.

Now, I assumed when I heard their plan that they really had something new and they were going to allege facts that actually supported an industry-wide all auto parts conspiracy, but that's not at all what this complaint is.

The framework is different from the underlying individual complaints because they allege this single conspiracy but other than that this complaint is just a combination of those other underlying complaints.

They basically took the facts from those complaints, they put them all in this one, they mixed them up so it looks like something more than it really is, and they changed the relevant product to automotive parts, that's how they define the product, and they define automotive parts as including all 18 of these parts even though the majority of the defendants did not make or sell most of those 18 parts.

And they have talked about -- or Mr. Williams explained how it is new, the fact that they have just learned about the Keiretsu system in Japan disbanding and that that is what they allege gave rise to this single-overarching conspiracy, but they knew about that in February of 2013 because the Wall Street Journal published an article about it. The Keiretsu system applies -- if it applies at all it applies to Japanese OEMs, it doesn't explain at all how some of the suppliers who supplied to GM or Hyundai Kia why they would be involved in this alleged conspiracy.

The other thing that Mr. Williams just spent a long time in his argument that they claim is new are these high-level meetings between Denso, Hitachi and Mitsubishi.

THE COURT: Just a minute.

MR. WILLIAMS: I was just going to ask, I apologize, if you are going into that that would raise the same issues?

MS. SULLIVAN: No, we are fine. I don't plan to get into it in detail.

THE COURT: Okay.

MS. SULLIVAN: My point is a -- a couple points about this. One is that these meetings didn't involve any other defendants. There is no allegation in the complaint that any other defendant attended these meetings or even was aware of them. Mr. Williams --

THE COURT: Wait a minute. Any other defendants then you've got Denso, MELCO, Hitachi and --

MS. SULLIVAN: Correct.

THE COURT: We know that --

MS. SULLIVAN: That's it, those three. Denso, Hitachi and MELCO attended these meetings.

THE COURT: From 2001 to 2009?

MS. SULLIVAN: Correct, according to the complaint, but there is no allegation that any other defendant that is named in this complaint participated in those meetings or was even aware of them. Mr. Williams argued just now that those three defendants controlled each of their Keiretsus, they were at the top of their Keiretsus and therefore all of these other defendants were under each of them. Well, that's not

in the complaint, and again it doesn't explain why defendants that sold parts to GM or non-Japanese OEMs would have anything to do with any of this.

All of this is important I think because when the plaintiffs asked you to consolidate all of these individual parts cases back in 2014 you rejected the idea on a number of grounds. You were concerned about the delay that it would cause, you were very concerned about the trial, which seems you are still concerned about, and at the time you indicated that the plaintiffs had not alleged an all parts conspiracy.

Your Honor, they still have not alleged any facts that plausibly suggest that these suppliers of these 18 parts got together and all agreed to fix prices and rig bids on all 18 of these parts. They have conclusory allegations in their complaint, and when the complaint is stripped of those conclusory allegations you find nothing but communications and contacts and even agreements, but those all relate to specific parts that specific defendants made and sold.

Mr. Williams gave you the example of Continental and Denso meeting together and agreeing. That allegation or those allegations specifically relate to one part, instrument panel clusters, and they relate to one OEM, Hyundai Kia. There is no allegation that Continental was aware of Hitachi, Denso and MELCO's meetings to divide up the rest of the auto parts market to the extent that there is such a market.

The end payors' and auto dealers' claims are not plausible and we don't believe they would survive a motion to dismiss. Thankfully you have given us a lot of guidance on what the Court believes is sufficient to survive a motion to dismiss in this case, and this complaint is very, very different. So I want to explain why this complaint would be dismissed at the 12(b)(6) stage when the underlying complaints -- or many of them anyway were not dismissed.

THE COURT: Well, according to plaintiff you won't need a 12(b)(6), right? Didn't they say there wouldn't be any other motions necessary if they did an amended complaint?

MS. SULLIVAN: Oh, there would definitely be motions to dismiss, Your Honor. I can guarantee you that everybody behind me on my left side --

THE COURT: I thought there would be another side.

MS. SULLIVAN: -- would want to file motions to dismiss.

And I can also guarantee you that there would be affidavits attached to those motions to dismiss that would show Your Honor that these defendants did not make or sell these parts, most of them, and did not compete against each other. So that's the first point.

In all of the other complaints that the Court allowed to proceed to discovery there were allegations that the defendants competed against each other for the parts that

were the subject of those -- of that complaint.

Second, in all of the other complaints there were factual allegations that the defendants agreed to fix prices and rig bids on those -- on that specific part that was the subject of that complaint.

Third, the Court relied in part on the fact that there were guilty pleas in those cases that addressed the specific parts that were subject of the complaint. That's not the case here at all. I know Your Honor has made it very clear that this scope of a guilty plea is not the same necessarily as the scope of the civil case, but you did rely on those guilty pleas in those other cases quite heavily as further support for the plausibility of the conspiracy that was alleged. We don't have those here, and, in fact, as you pointed out, the government has made many statements that indicate that the government concluded after many years of investigation that these were separate conspiracies, not a single one.

THE COURT: But the government could charge that they were separate conspiracies but they never directly said anything about one overarching conspiracy, right? I mean, there is nothing that the government put out that would either show or not show an overarching conspiracy?

MS. SULLIVAN: Well, it is correct they charged individual conspiracies but they have made statements.

Attorney General Eric Holder made a statement at a parts conference in 2013 that this -- the conduct this investigation uncovered involved more than a dozen separate conspiracies aimed at the U.S. economy and these cartels operated totally independently. That was one statement.

The next step was from Assistant Attorney General Bill Baer, which was actually sworn testimony at congressional hearings on cartel prosecution, and he stated those September charges involved more than a dozen separate conspiracies. The multiple conspiracies charged in September affected U.S. automobiles in 14 states. That was the statement that was made under oath.

And then the final statement that we have highlighted here was from Deputy Assistant Attorney General Scott Hammond, and this was at an auto parts conference in 2013, and he stated there were more than a dozen separate conspiracies each operating independently.

He then went on to say the detection of one auto parts conspiracy has led to the discovery of other conspiracies involving a new set of products, a new group of conspirators, and a new list of victims.

THE COURT: Thank you.

MS. SULLIVAN: So let me touch on the first reason why this complaint is so different from the others that the Court has allowed to proceed to discovery. Again, there are

no factual allegations that these defendants competed for the sale of all of these 18 parts which the end payors and auto dealers have defined as automotive parts. The end payors concede the horizontal conspiracies under the Sherman Act require agreements between competitors. In their reply brief there is a statement that horizontal price fixing is any arrangement among competitors that interferes with the setting of price by free-market forces, but the facts alleged in this complaint suggest that the 23 defendants sold different unrelated products, they didn't compete, and there are no allegations that they even could have competed given how different all of these products are.

In addition, in the 18 underlying complaints that now the end payors are trying to bring into one, the plaintiffs alleged high barriers to entry so they relied on the fact that, for example, the HCP market, which is heater control panels, the HCP market is a highly-concentrated market, it has barriers to entry, and therefore a defendant like Alps who didn't plead guilty but does make heater control panels, it was more likely or more plausible that that defendant also participated in the conspiracy despite the lack of its guilty plea. So it doesn't make any sense to have an underlying market for heater control panels that is difficult to get into. If other suppliers can't get into it how can they be competing as part of this broader auto parts

market?

THE COURT: Or why would they?

MS. SULLIVAN: Exactly. They do include boilerplate conclusory allegations that all defendants, quote, manufactured, marketed and/or sold automotive parts, so all 18 parts. There are two problems with that conclusory allegation. One is that because it includes all 18 products it is not a true statement for any defendant other than Denso. Second, the Court has twice rejected that very same conclusory boilerplate allegation in two motions to dismiss rulings in this case. The first was in the truck and equipment dealer case against Mitsubishi Electric. There the Court dismissed the claims for exactly this reason. The Court said that the collective acts that the plaintiffs had alleged could not be attributed to MELCO defendant given the fact that there was a lack of plausible allegation that Mitsubishi Electric even competed in the truck and equipment market. There, as you may recall, the plaintiffs had alleged that Mitsubishi Electric participated in the wire harness conspiracy targeting truck and equipment manufacturers, and the Court rejected the claim because there was no allegation that MEC or Mitsubishi Electric had sold wire harnesses to truck and equipment manufacturers.

There was a similar boilerplate allegation about the fact that MEC sold those parts to truck and equipment

manufacturers, and the Court rejected it as boilerplate.

The same decision -- or the same result occurred in the truck and equipment dealers' complaint against Fujikura, Limited. There the Court said TED plaintiffs' general allegation that all defendants, which would include F-Co., manufacture and sell vehicle wire harness systems for truck and equipment in the United States does not withstand the declaration by F-Co. To show that it did not manufacture or sell any wire harness that was installed in trucks and equipment.

So the Court would likely reach the same result here if we allowed this complaint to go forward and the defendants filed motions to dismiss, which they would do.

The plaintiffs claim that all defendants competed because they all sold to OEMs, but there are no facts to support the fact that they did compete despite the fact that they all sold to OEMs, they all sold different products to OEMs that were completely unrelated to each other.

And the fact that the defendants didn't compete renders the conspiracy allegations implausible. There is a conclusory allegation that the defendants refrain from competing and allocated customers. There are no facts to support those allegations. There are no facts in this complaint that suggest that, as Mr. Williams argued, two suppliers of two different parts agreed that they would not

supply each other's parts, that's not in this complaint, it doesn't exist. That's what distinguishes this case from the Vitamins case which the end payors rely heavily on. There the plaintiffs alleged that the defendants participated in meetings and agreed to allocate volumes of markets, sales of the particular products, and effectively not to make products that other vitamin manufacturers were making. That doesn't exist here.

Further, the allegation that the defendants rigged bids is also completely implausible because, for example, a supplier that makes windshield wipers doesn't even receive a request for a quotation from an OEM for engine parts, so it is not plausible that a windshield wiper manufacturer would agree on bids to submit in response to an engine RFQ.

In the Ashland-Warren case in the Middle District of Tennessee there is a great quote that says price fixing by means of bid rigging is flatly impossible when the alleged conspirators are also not competitors. I believe the Court recognized this fact when it dismissed the claims by the truck and equipment dealers against Fujikura, Limited and Mitsubishi Electric.

So the next way this complaint is completely different from the other complaints that you have allowed to proceed to discovery is the fact that there are not allegations that the defendants all agreed to fix prices and

rig bids on all 18 products, the automotive parts. No one disputes that to allege a horizontal conspiracy claim plaintiffs must plausibly allege that each defendant had a conscious commitment to a common scheme to fix the prices of all of these parts sold to OEMs. And in order to allege a conscious commitment to a common scheme the plaintiffs must allege that each defendant knowingly entered into this conspiracy. In all the other complaints the plaintiffs allege facts that supported the allegation that the defendants agreed to fix prices and rig bids on the particular part that was an issue in this case. There are no such allegations here. Other than the boilerplate allegation that everybody agreed, the only factual allegations relate to specific parts. For example, the Continental discussions with Denso, those relate to instrument panel clusters, that's it; no other parts were part of that discussion or that agreement.

THE COURT: There is nothing in the amended complaint to show an agreement to the common scheme?

MS. SULLIVAN: That's correct, that's correct. There is no allegation that shows that there was even as much as a communication relating to the common scheme let alone an agreement. There is no allegation that shows that the defendants that are in one or two parts cases even knew other defendants who made different parts. There's no allegation

that suggests that the defendants knew about, as I said, the MELCO, Hitachi and Denso meetings. There is no allegation that explains why any defendant that makes a heater control panel would have any incentive to join a conspiracy to rig bids on ignition coils, a part that it has no relationship to whatsoever.

So as a whole when you read this complaint it describes a series of separate conspiracies. As I said at the outset, the allegations are mixed up so that it looks like more than it is, but when you break it down it is a series of separate conspiracies.

The Precision Associates case is directly on point. There you had a number of defendants who were freight forwarders and they had operations all around the world. The complaint alleged specific facts that they engaged in local conspiracies, so there was a conspiracy in Europe to fix a surcharge -- or to impose a surcharge there. There was a different conspiracy in Japan, a different in China depending on a particular surcharge at issue. Just as here, in that case you had a defendant that was in all of these local conspiracy, so effectively the Denso of this case, that was in that case as well. You also had a handful of other overlapping defendants like we do here, but the Court rejected the single conspiracy allegation because the local conspiracies had applied to different routes, they had

different participants, they were entered into at different times, and different meetings occurred that related to the various conspiracies.

We have exactly the same situation here, these are completely different parts, each agreement that is described in this complaint with the exception of Denso has different participants. There are different RFQs issued by different OEMs at different times, and that's what the complaint shows, that Continental and Denso, for example, were getting together to talk about the instrument panel cluster RFQs that Hyundai Kia issued, and there were different meetings during which these agreements were reached.

The case for dismissal here is even greater than there because there at least all the defendants were capable of supplying the same product. We don't have that here. There is no allegation that my client, Weastec, could have supplied anything other than ignition coils. That's all that Weastec has alleged to have supplied, and there is no allegation that we could have done anything else.

Notably, this Court reached the same conclusion when it dismissed the truck and equipment dealers' complaint against Fujikura, Limited. There the truck dealers claimed that the defendants that sold wire harnesses for cars were the same as for trucks, and that these defendants engaged in a single conspiracy to fix prices for both wire harnesses

that go into cars and wire harnesses that go into trucks. You rejected that argument. The Court explained that the overlap in defendants, the overlap in OEMs and the overlap in component parts did not create a single conspiracy.

Plaintiff said that it is enough that each defendant conspired with Denso, but as I have said, the allegations only show that each of those defendants that had communications with Denso did so specifically about the product that it sold. There is no allegation that any communication with Denso was about the entire 18 product lists.

So the next reason why this complaint is different from the other is lack of guilty pleas, and I won't spend time on this because we have already gone over the government statement, but I will say in the prior rulings that Your Honor has issued, in every single one of them for the parts-specific cases the Court relied on the guilty pleas and, again, you indicated that the plaintiffs could allege conspiracies that were broader than the guilty pleas but at least there were guilty pleas, and that was one reason why you -- the Court inferred that all the defendants had participated in the conspiracies that is -- were alleged. There is not a single guilty plea that covers all 18 parts, not one.

THE COURT: I just wonder about one thing, I don't

know if you know this, and I didn't reread the pleas, but is there anything in the pleas, and maybe plaintiff would know this, is there anything in the pleas on the one part that they are pleading to, because they were all single parts except Denso, is there anything in the pleas that refer to the other parts at all; did they come up in the discussion when they were doing the colloquy?

MS. SULLIVAN: No. In fact, Your Honor, that is a very good question because there, in fact, is nothing in the pleas that describes this overall customer allocation scheme or a part-by-part allocation scheme, and again that's very different than the Vitamins case. In the Vitamins case the guilty pleas did describe product allocation, in other words, the guilty pleas charged that the defendants got together and agreed on the volumes that each would supply of the various different vitamins that were covered as well as who was going to sell which vitamin and in what geographic area. We don't have that in a single one of these pleas.

THE COURT: Okay.

MS. SULLIVAN: So finally in all of the decisions that the Court has issued on motions to dismiss in the underlying part-specific cases the Court has relied on the allegations relating to market conditions. As you may recall, in each of those cases the plaintiffs alleged that the individual product market was ripe for collusion. It was

highly concentrated, there was interelasticity of demand and high barriers to entry. And here they make the same allegations except the highly concentrated market, that's left out of this complaint, but the others are there, and in the reply brief the end payors and auto dealers made it clear that they want the Court to infer this overarching conspiracy based on the, quote, automotive parts market's structure and characteristics which they say render the conspiracy more plausible.

To be meaningful and certainly to be the basis for an inference of an overarching conspiracy, the market allegations have to be plausible and they are not even close. So as I noted at the outset, there are 30 plus auto parts cases but this complaint only covers 18 of them. So what about occupant safety systems, what about wire harnesses, automotive lamps, automotive hoses, are they not also automotive parts? I think they are, but they are not included.

The end payors and auto dealers claim that they picked the parts that Denso makes but that doesn't really make sense that you would have a market for that reason. The other defendants -- or some of the other defendants that are also named as defendants in this case make other products that are not included. So if we take a look at the slide, the red boxes are parts that are made by a handful of the

defendants; Tokai Rika, MELCO, Mitsuba, who where also defendants in this case. So it isn't plausible that there is an automotive parts market that include the parts that Denso makes but does not includes the parts that these other defendants make, these other defendants that are alleged to have participated in this very same single overarching conspiracy. Additionally, each of the underlying 18 part-specific complaints alleges its own distinct product market, as do all of the complaints that are not in the blue shaded area, so body ceilings over there on the left, the body ceilings complaint contains an allegation that it has its own distinct product market and, again, highly concentrated, interelasticity of demand, barriers to entry, all of which they claim in that complaint makes the conspiracy allegations more plausible.

So what they are saying now is that the parts that are not included in this all automotive parts market each have their own distinct product markets but the 18 parts that are part of the, quote/unquote, auto parts market do not. It is just not plausible. And, as I said, it is also inconsistent with the underlying 18 complaints.

So we believe that this complaint will not survive motions to dismiss. There will be many of them. As I indicated at the outset, I expect that the defendants -- many of the defendants, 70 percent or more, are only in one or two

cases, those defendants will submit affidavits that show, Your Honor, that they did not make or sell or even have the ability to make or sell the vast majority of these 18 products.

In addition to futility, the 6th Circuit has made very clear that when a party is prejudiced by an amendment the amendment should not be allowed. And two ways in which the 6th Circuit has recognized a defendant can be prejudiced is if the resolution of the case is delayed or the amendment will require significant additional expense and burden, and defendants in this case would be prejudiced in both ways.

First, it would take much longer for the cases to be resolved. The current structure looks like this, and it is actually working. I understand that this is a massive case, it is one of the largest ever, but it is working, the structure that the Court set in place five years ago. The first three cases have gone through amended complaints, orders on motions to dismiss, new answers, discovery is underway, those cases have been pending for four years now and they are ready to start depositions, we just need that deposition protocol entered, which Your Honor entered a ruling on last week, and depositions are ready to begin in those three cases. And some of those cases are pretty small, they have just a few defendants, the heater control panel case, for example, only involves sales to one OEM, and we

believe that those can move fairly quickly. There is no reason to hold them back, they are ready to go through depositions and head forward towards class certificate.

The next nine cases have all had rulings on motions to dismiss, and the only thing that is stopping discovery from happening in those cases are 26(f) conferences, which the defendants have been pushing now for months and the end payors and auto dealers have not wanted to proceed with those conferences in large part I think because they planned to file this motion, but those cases are ready to go. So we will be in discovery -- in full discovery in 12 cases any day now basically. An amended complaint would slow everything done, all of these cases would have to wait for the other. So the HCP and the fuel senders and instrument panel clusters cases would have to wait for discovery on the remaining 15 when, as I said, they are far advanced and they are ready to head towards class certificate once they complete depositions in those cases.

Weastec, which is the company that I represent, that is a defendant in the ignition coils case, right now it is facing about 55 defendant depositions because there are five defendants and -- I mean, the math is not exactly right but about 55 depositions. If we were pulled into this massive amended case involving all of these parts there would be nearly 800 depositions that Weastec would have to wait for

before any resolution, and Weastec has very good arguments, Your Honor, for why it should not be in these cases at all. Weastec had a vertical licensing agreement with Denso, and we intend to show the Court that all of our communications with Denso related to that licensing agreement, and we are entirely lawful. We don't want to have to wait for 800 depositions and millions of documents to be produced by all of these other defendants to present that argument to the Court.

And Mr. Williams indicated that the plaintiffs have proposed a schedule that would resolve this 18-part case faster than the others. It is impossible to meet. What they are effectively proposing is that we resolve all of these cases with almost 800 depositions, hundreds of millions of documents, hundreds of millions of transactional data entries, all within half of the time that it has taken to -- that it will take to get to class certification in the wire harness case. That is impossible, and this is even though we have put procedures in place to streamline cases after wire harness, and things are moving faster -- the cases are moving faster in the current structure, but if you pull them all into one it will slow everything down.

And the burden and expense that the defendants would experience if this complaint was allowed to proceed is extremely high. As I have indicated, almost 80 percent -- I

think I said 70 percent earlier. More than 70 percent of the defendants in this amended complaint only made one part, maybe two parts, that's it. And right now they are facing a relatively reasonable number of depositions, a relatively reasonable number of documents to be produced, and if they get dumped into this massive case their discovery expenses and burdens will multiply dramatically.

THE COURT: That would be true if -- I mean, as difficult as it would be for the defendants, if plaintiff could show that they had, you know -- if their complaint was plausible then you would have to do that.

MS. SULLIVAN: That's correct, that's correct, and that's why I focused on all of the reasons why this complaint is not plausible and will not satisfy the standard that you have set for the pleadings in this case because we need to be darn sure that we have a legitimate complaint that plausibly alleges a single conspiracy before we impose this burden and expense on all of these defendants.

THE COURT: Okay. I agree. Thank you.

MS. SULLIVAN: Thank you, Your Honor.

THE COURT: Thank you.

MS. STORK: Good morning, Your Honor. Anita Stork on behalf of the defendant Alps Electric.

I will be fairly brief. What I want to do is point out some of the facts that are unique to Alps and its status

in these cases, which truly demonstrate that, one, the plaintiffs have unduly delayed bringing this motion, and that, two, it will be prejudicial. And Your Honor mentioned trial, which is something that I will address.

I want to just add one point to Ms. Sullivan's argument about the discovery burden. I do think that there are defendants in this case that if it is consolidated we may well attend each one of the depositions because we want facts on the record to say to somebody that we never competed with did you ever communicate with Alps? Did you ever talk to Alps about anything? We want to get that on the record so we can move for summary judgment to get out from alleged liability for the making of these other parts and the coordination on other parts that we did not even make.

THE COURT: Okay.

MS. STORK: To go back to Alps, Alps is similarly situated to the Weastec group of defendants with whom -- for whom Maggie -- Ms. Sullivan was arguing on behalf of. Alps is a defendant in only one case. And the reason that this is very important is that Alps has been a defendant for a long period of time. Alps has been a defendant in the HCP case for three years. It is a small case, it involves only three other defendants, and Alps is unique among that group, they did not plead guilty, two of the other defendants pleaded guilty, and the other defendant is the likely amnesty

applicant.

Discovery in the HCP cases has been open for a year and a half, since July 2014. So, first as to the delay, plaintiffs have inexcusably delayed in bringing this motion. And as the 6th Circuit has observed, a party must act with due diligence if it intends to take advantage of Rule 15's liberality when it comes to amended pleadings. So plaintiffs' excuse for the delay, as you heard Mr. Williams say, is partially that a leniency applicant supposedly dribbled out the facts they knew to come up with this amended complaint with 18 parts, but that certainly rings hollow with respect to HCPs because Sumitomo is the amnesty applicant in heater control panels and plaintiffs have never argued or asserted that there was any problem with the amount or the timing of the cooperation that the heater control panel leniency applicant gave them. So when we go to the leniency applicant in the other 17 cases who supposedly dribbled out facts, there are no facts that are dribbled out concerning Alps.

The plaintiffs' proposed amended complaint doesn't add any new allegations against Alps. As a matter of fact, it shrinks the number of allegations from two specific instances of conduct to one specific instance of conduct in the proposed amended complaint, again, only focused on HCPs. And the nothing new against Alps is consistent with the last

three years that Alps has been a defendant in the HCP case. There has been more than 26 defendants that have pleaded guilty, at least 10 defendants that have settled that have provided cooperation and information to the plaintiffs, but yet there are no new allegations in the HCP case in these intervening three years, and Alps has not been added to another case. And, again, most pertinent to the motion here today, there are no new allegations against Alps in the proposed amended complaint.

Plaintiffs also attempt to excuse their delay by asserting that all the cases sought to be consolidated are at the beginning of discovery. It is just not true. When it comes to heater control panels, discovery has been open since July 2014, several of the defendants gave their DOJ productions in heater control panels to the plaintiffs several years ago, and as Ms. Sullivan pointed out, discovery has been ongoing in the heater control panel cases and documents have been produced, several defendants have produced documents.

And also as Ms. Sullivan pointed out, the parties were on the edge of agreeing on discovery and class certification schedules, which negotiations fell apart I think because plaintiffs wanted to file this motion, but we do have those initial orders pending before Your Honor that the defendants in HCPs have submitted.

I also want to touch really briefly on the prejudice issue at trial which you mentioned, Your Honor. Alps would suffer overwhelming prejudice through the possible confusion of issues at trial. So as I have mentioned, as it stands right now Alps is a defendant in the HCP case only. That case would be a trial about the three remaining defendants, a single part, heater control panels, and a single OEM. If the Court were to grant plaintiffs' motion the trial of this consolidated-amended complaint would have almost two dozen defendants, six coconspirators, at least 45 parts, and multiple OEMs. So there are no allegations that Alps ever communicated with companies that it didn't compete with, no allegations that Alps communicated with Mitsuba, why would it because Alps doesn't make the parts that Mitsuba makes, and we certainly didn't talk to them about parts that we didn't make. In this consolidated trial the jury is going to hear -- will hear likely days, if not weeks, about companies that Alps didn't compete with, Mitsuba, Kyoto, the list goes on and on. The jury will hear days, if not weeks, of testimony about parts that Alps didn't make, doesn't make, never submitted bids; ignition coils, radiators. We just think the likelihood of confusion for the jury to assign specific evidence to specific defendants and claims would be unduly prejudicial.

THE COURT: Okay.

MS. STORK: Thank you, Your Honor.

MR. BAIRD: Good morning, Your Honor.

THE COURT: Good morning.

MR. BAIRD: I too will be brief. I represent Keihin.

THE COURT: Your appearance?

MR. BAIRD: Sorry, Your Honor. Bruce Baird for Keihin. I represent Keihin in the end payor case only, and Keihin North America in the end payor and auto dealers case. I will call them both Keihin.

Just to remind Your Honor, Keihin is only in one set of cases, the fuel injection system case. They sell only one type of product, and they sell -- uniquely they sell to only one manufacturer, they have not pled guilty. They are not under investigation. No other defendant in any of the cases is as isolated from the many events in this vast proposed complaint than Keihin.

So I have two points to make, Your Honor, as to why as to Keihin the plaintiffs' motion should be denied as futile.

First, is it plausible based on the factual allegations in the complaint that Keihin competed with -- was a competitor of the many companies in the complaint, and Ms. Sullivan spoke to that quite a bit. Keihin doesn't make these parts, Keihin only makes the one set of parts, and

Keihin only sells to one carmaker, to Honda, that's the only carmaker they are alleged to sell to. And incidentally Honda is one company that Mr. Williams didn't mention. His new allegations of these Keiretsus relate to Toyota, and they relate to Nissan, and they relate to Mitsubishi, they actually don't relate to Honda. I suppose it is another Japanese automaker but that's the only thing we have. Keihin did not compete with most of these companies and so it cannot have entered a horizontal price-fixing conspiracy with them.

The second point is based on the factual allegations in the complaint, and Your Honor pointed this out when Mr. Williams was up here, did Keihin agree, as in any conspiracy, agree to enter into a conspiracy with most of these companies which make parts Keihin is not alleged to make and sell to carmakers Keihin is not alleged to sell to? If not, Keihin can't have entered into this or any other conspiracy.

It is not a question of illustrative examples. There's really no facts and there can be no facts. Indeed, you can ask plaintiffs where in the complaint they have pointed to facts that show that Keihin agreed to this big conspiracy.

So, first point, in a little more detail I want -- I mean, I want to tell -- give an example, a homely example which perhaps will have a point. Again, you can't engage in

horizontal price fixing if you don't compete. So let's take the case of McDonald's, and let's take the case of a company that just sells to McDonald's its special sauce, that's the only thing they make, it is the only thing they can make, and they just sell to McDonald's, they sell the special sauce. There is one other company that sells this special sauce to McDonald's, and let's call that company D, but company D is a big company, they don't just make special sauce, they make hamburgers and buns and lettuce, and they compete with all kinds of other companies that make hamburgers and buns and lettuce, and they sell not only to McDonald's but also to Burger King and to Wendy's, White Castle. And as company D sells these other products and competes with these other companies and let's assume fixes these other prices with these other companies, company K is not part of that. I mean, let's assume that company D and company K agree to fix the price of special sauce, they did that but there is nobody else that is part of that, but then company D has many other things they sell, maybe other conspiracies that they might enter into but company K is not part of that. If anything, company K would like the price of everything else McDonald's buys to be lower so that they don't mind paying extra for the special sauce. They have no interest in the parts -- the prices of these other things being higher. They can make those other things, they don't sell those other things, and

they don't sell them to anybody but McDonald's.

What would company K gain from that kind of conspiracy? What incentive would it have to join? How is it plausible that they join that kind of conspiracy? It is not plausible because they don't compete. So that's my first point, no competition means no conspiracy.

It means no -- so now let's go with the second related point, Your Honor. You need to actually agree, it is the essence of any conspiracy as Your Honor pointed out. And just as Keihin's isolated position means they do not compete with most other companies, it also means it is implausible or impossible for Keihin to agree with them. Let me give you an example of this.

Let's talk about a group of drug dealers in the same neighborhood. That's the way plaintiffs think of us anyway, we are all drug dealers in the same neighborhood. Let's say Columbus, Ohio, and this is a real case. They are alleged to be part of the same conspiracy because they are alleged to have all agreed that no one else can sell drugs in this neighborhood, we are the only ones that can sell. Well, that's not what the facts were in the case. They were all drug dealers. They all sold in that neighborhood. Some agreed to each other, two or three at a time to do this or that drug deal, but there was no evidence that they had all agreed that no one else could sell in the neighborhood. I'm

sure it was more efficient for the government to charge that as one conspiracy. They wanted to get all of these drug dealers in the same case, so they charged them all with agreement to keep everyone else out, and this is United States against Gibbs, and I can hand Your Honor a copy. We just came up with this and have it, it is 182 F 3rd 408, 6th Circuit in 1999. It is a basic conspiracy case, and it is not an antitrust case, but you need agreement.

The 6th Circuit reversed these six drug dealers' convictions for allegedly conspiring with other dealers to control the distribution of drugs in the neighborhood because there wasn't any evidence of that broad agreement. And they specifically said -- the 6th Circuit specifically said it was not enough that they were all drug dealers, it was not enough that they knew the others and may have had more limited agreements with some of them, it was not enough they belonged to the same neighborhood association, it is not enough that some of them had records for selling drugs. The evidence just showed they all sold a lot of drugs and not that they agreed to one overall conspiracy.

Of course, plaintiffs don't have to prove anything at this stage but they have to allege, they need to make factual allegations making it plausible that there was this overall overarching agreement, not just between two or three of the drug dealers like company K and company D, to sell

drugs at a given moment, that might be a separate case but that's not the claim. The claim is there is an agreement among everyone to control the distribution of drugs or to fix prices. That's what they are alleging, and they don't have any proof of that.

The claim is, as you heard it from Mr. Williams, anyone who agreed with Denso about anything is therefore agreeing with everybody about everything. Your Honor, I submit if there was not enough to show that these Columbus, Ohio drug dealers agreed to be bound by the same conspiracy there's certainly no allegations here sufficient to make plausible that single product, single customer, Keihin was part of this huge conspiracy with all of these companies.

THE COURT: Thank you.

MR. BAIRD: That's my argument. The only thing I would say about prejudice, Your Honor has heard it all, is that Gibbs, this same conspiracy case, the 6th Circuit warned about the danger of prejudice in a big multi-defendant case like this. They were concerned that that's why these six drug dealers had been convicted even though there was no evidence because of the prejudice inherent in a case like that.

The 6th Circuit again in Nixon warned about the burdens in a huge antitrust class action in particular.

THE COURT: All right. Thank you.

MR. BAIRD: Thank you, Your Honor.

THE COURT: Mr. Cherry?

MR. CHERRY: Thank you, Your Honor. I'm Steve Cherry. I'm with the law firm Wilmer Hale, and I'm speaking on behalf of the Denso defendants.

As Ms. Sullivan pointed out, the plaintiffs here have failed to allege facts to support an overarching conspiracy among these 23 defendants, involving these 18 different auto parts. And as Ms. Sullivan went through and with the slides, this isn't just about pleas, this really is -- the DOJ has been very up front about what they concluded here after six years of investigation with a full power of the government, the power of Grand Jury, they have testified before Congress, and the DOJ has said they found multiple separate independent conspiracies. That's what we have on the one hand.

On the other hand, we have the plaintiffs presenting this proposed consolidated-amended complaint with factual allegations of separate and independent conspiracies, and then this conclusory assertion that somehow this is all one overarching conspiracy, but there is not one factual allegation to support it.

And the lack of facts here is stark especially when you consider that at this point the plaintiffs admit that they have had the benefit of the full cooperation of various

leniency applicants that includes attorney proffers, documents, witness interviews. They admit that they have received tens of millions of documents from the various defendants, documents they produced to the DOJ, documents in discovery. Plaintiffs further admit they have received the full cooperation from at least six settling defendants, and they rely on that heavily here. And yet with all of that discovery, with all of that vast amount of information, there is not one witness, not one document that says there was any overarching conspiracy among these 18 defendants -- 23 defendants for these 18 products, not one.

Instead, plaintiffs merely combine allegations of product-specific bid rigging between the suppliers who made those products, and that's just as they allege in their current complaints. In fact, if you take those allegations and you focus on the products at issue, which they have tried to blur here, but if you focus on the products they all come -- they are all consistent with 13 of their 18 current complaints. They take product-specific bid-rigging allegations consistent with those 13 complaints, they have mixed them all up so it is not so obvious, and they changed the names in a few places from the product to auto parts, which is what Mr. Williams tried to do in his argument here, he used the term auto parts when it was really about instrument panel clusters. So there is no allegation of any

communication about any overarching conspiracy. And as I think others have pointed out here, notable here is there is no allegation of any communication between two suppliers who didn't make the same product. You would think you would see something like that if there was some overarching conspiracy here, there isn't, not one, and there is nothing new in this proposed consolidated amended complaint.

Mr. Williams pointed to two things which he says are new and which he says supports this overarching conspiracy. One, he says that they have just learned through their investigation that Carlos Ghosn, the Nissan CEO, came in and broke up the Keiretsu system in the late '90s. Well, in fact, that's nothing new, everybody has known that for years. The Wall Street Journal had a feature article about that in February 2013 which reported on that and blamed that for all of these cases in the MDL. There has been a lot of discussion about that. They didn't just find that all of a sudden.

Second, and I would like to -- I'm sorry, I would like to address something that --

THE COURT: That was February of 2013 or 2014?

MR. CHERRY: 2013. We can submit the article. I thought we were going to use a slide that showed it, but I'm happy to submit the article.

I would like to address some of the facts that

Mr. Williams alluded to, so we may need people to leave. Sorry.

THE COURT: All right. Direct purchasers are leaving.

(All parties not subject to this motion were excused from the courtroom at 11:32 a.m.)

THE COURT: Can we bring them in?

MR. CHERRY: Okay. Shall I wait or shall I keep going?

THE COURT: Let's get them in.

(Courtroom was open to the public at 11:39 a.m.)

THE COURT: Okay.

MR. CHERRY: I think pointed out by others, the case they rely on here is Vitamins, starkly different. Vitamins, the pleas were for vitamins. Here the pleas were for particular parts. Vitamins on paragraph 93 of page 26 of the complaint specifically goes through all the vitamins and it says they all met to discuss these and it says the conspiracy divided and allocated such market by region and by vitamin, and that was implemented by the defendants and their coconspirators and executives. There's no allegation like that in this complaint nor could it be made consistent with

the Rule 11, nothing like that is alleged by anybody to have happened here, and that's the case they rely upon.

Finally, we put forth in our opposition that we believe at this point the IPPs should be estopped from even making this sort of argument. They have taken diametrically opposed positions on what the market is, how these markets work. They have described in their complaints what is, in fact, true, that auto parts are very different products, that they do require different technology, different intellectual property, different manufacturing facilities. Different types of companies make these very different products, and they allege that because of that there are high barriers to entry that prevent other companies from making those products including defendants.

Now -- again that's very different from the allegations in Vitamins, but now they are alleging, you know, with no facts to support it, Mr. Williams is sort of asserting here that there may have been some conspiracy for the wiper maker not to make alternators or radiators. There's no facts in the complaint to support that. There is nothing in any plea to support that. They cannot allege that in good faith.

And Your Honor has relied upon the allegations that they have made in prior complaints, in denying motions to dismiss, in approving settlements. We have gone a long way

with the case now based on those allegations. We have spent a lot to defend those allegations. Your Honor, again, has relied upon them. To now throw that away and say no, we are taking an entirely different approach for whatever tactile reason we have at the moment. I think the cases do say they are estopped from that, and I would refer to the Lorillard Tobacco case for that in particular.

Finally, in terms of consolidation as others have alluded to, there would be huge prejudice here to the defendants if consolidation and amendment were permitted in terms of burden and cost on the defendants in terms of discovery and motions practice and never mind this mega trial that Your Honor has referred to as unfathomable if consolidation were granted. On the other hand, there is no prejudice to the plaintiffs if Your Honor denies the motion. We are in discovery on 12 of these products now, and they seem to be wanting discovery. We are in discovery. If they want discovery they should have agreed to have a 12(f) conference when we have been asking for them since November. We have been trying to move forward with discovery, and we are getting resistance, and I think it was to support this motion, so they could say things were not further along, but we are in discovery now for 12 of these 18 products, and the rest they haven't served and we haven't had motion practice. We are ready to do that, we are ready to have motion practice

as soon as they complete service and we get a schedule.

And beyond that, they say they want to avoid duplication and inconsistent rulings. Well, that's the whole point of the MDL. That's why we are here. We are working hard to avoid duplication, and duplication only has to do with 6 of the 23 defendants, the other 17 are only in one case, there is no duplication. And for the -- for the 6 that are in more than one case, there are a few custodians, a few witnesses that are really central to more than one case, and where there is it is in the defendants' interest to work that out and to coordinate and avoid duplication more than the plaintiffs, and we are going to do that. In fact, we insisted on having language in the deposition protocols to facilitate that. So you don't need to totally disrupt the current structure of the MDL to accomplish that, we have that and we are doing that.

THE COURT: Okay.

MR. CHERRY: So that's my argument, Your Honor. Thank you.

THE COURT: Thank you.

MR. MILLER: Your Honor, Todd Miller for the two Tokai Rika defendants, and I will be extremely brief.

THE COURT: Is it Miller?

MR. MILLER: Miller, yes.

THE COURT: Okay.

MR. MILLER: Two very quick points, Your Honor. The first is the statute of limitation, and this continues on with the futility arguments that you have been hearing. As to the Tokai Rika defendants we were part of the original raid, and so you are presented with essentially the other side of the pancake that you have already been addressing, and that's one reason why I don't want to spend too much time. You just most recently addressed this with the trucks case, and you dealt with it in a couple other of the parts case. So what you have got here is Tokai Rika was raided, as you have said in the trucks case, that was a very well known public event that happened in February of 2010, here it is early 2016. So Your Honor will face some serious statute of limitations issues as to the Tokai Rika and perhaps other defendants. And really what it comes down to is the plaintiffs have argued simply, well, fraudulent concealment. Well, what has been fraudulently concealed? Really nothing. There are no new facts here that they have alleged that weren't available to them before. When you look at their own -- the declaration or their complaint, there is nothing really new there whatsoever.

Paragraph 402 of their complaint is the only place where they allege anything about the affirmative acts of concealment, and they tell us that these acts include denying the conspiracy alleged and inserting that there were a

multitude of separate conspiracies. Well, as we know from the Carrier Corp. case from the 6th Circuit, that's just not sufficient, Your Honor. So there is no fraudulent concealment that they can point to that would allow them to toll the statute of limitations and so they are left as to us with a very public event that should have triggered at least notice, and I do recognize that this is under state law so Your Honor would have to address that, but again your court -- this Court has faced that with the truck case, and they are really left with nothing.

The second point that also goes to futility but also touches upon prejudice is the notion that their complaint wouldn't relate back under Rule 15, and the reason is is that when you consider what they can do to relate back they have to put us on notice that we could be called to answer for the allegations in the amended pleading. Well, there is absolutely nothing that has gone on before now in the heater control case, which is the only one relevant today for Tokai Rika, that would allow us to know that somehow we are going to be charged with a conspiracy that covers 17 parts that you now have repeatedly heard we don't make any of those parts that are subject to this consolidated-amended complaint.

So, again, you have the relation back notion that sort of ties in with the statute of limitations, and you also

have it prejudicial because now we are being subject to a bunch of litigation that we had no notice of essentially. So with that I will just stop --

THE COURT: Thank you.

MR. MILLER: -- because Your Honor has dealt with these in the other cases and you've got this in our briefs.

THE COURT: Thank you, Mr. Miller.

MR. MILLER: Thank you.

MR. WILLIAMS: May I, Your Honor?

THE COURT: Ready to proceed?

MR. WILLIAMS: May I ask the Court if we could again have those same people leave the courtroom for a moment?

THE COURT: Okay. They are getting their exercise today.

(All parties not subject to this motion were excused from the courtroom at 11:48 a.m.)

THE COURT: Yes, we are done, we are done. Thank you.

(Courtroom was open to the public at 12:12 p.m.)

THE COURT: Mr. Williams, it is your motion so do you want to say something in the end or --

MR. WILLIAMS: I don't want to push it. I'm just going to say one last thing, which is I said what I said about the Keiretsus and the Tomoe-Kai. I didn't step back or change anything. I wasn't caught in anything. I said the two relate but you need the real story of the Tomoe-Kai to explain how it fits and started this conspiracy. Thank you, Your Honor.

THE COURT: All right. We are done with that. The Court will issue an opinion.

Now we have the direct purchasers. Let's -- how long do you anticipate or are you just agreeing with the indirects? Who is going to speak?

MR. WILLIAMS: Actually --

MR. FINK: It will be very brief.

MR. WILLIAMS: I'm very sorry to say this, but one last thing. There is an argument about how the directs didn't join this and they are not part of this motion. That's got nothing to do with the merits of this motion because we buy cars, they buy parts, so it really has nothing to do with this motion.

MR. SPECTOR: Good morning, Your Honor. Eugene Spector on behalf of the direct purchasers. We really have no position on this motion.

THE COURT: Okay. That's what I want.

MR. SPECTOR: Thank you.

THE COURT: All right. I think that's -- yes, Counsel?

MR. CAROME: Your Honor, there is a discovery motion that you also set for hearing.

THE COURT: I know that.

MR. CAROME: Do you want to do that now or do you want to take a break?

THE COURT: No, we are going to take a short break before we do the discovery. I just want to make sure while everybody is here, is there anything else that anybody has regarding this motion?

(No response.)

THE COURT: Okay. We are all set. Let's just take ten minutes and then we will resume.

THE LAW CLERK: All rise. Court is in recess.

(Court recessed at 12:14 p.m.)

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(At 12:25 p.m. Court reconvenes, Court, counsel and all parties present.)

THE LAW CLERK: All rise. Court is again in session. You may be seated.

THE COURT: Just one minute. All right. Back on the record, and this is on defendants' objection to a motion to modify the orders of the Special Master regarding compelling documents from Rush Truck.

MR. CAROME: Yes. Thank you, Your Honor. My name is Patrick Carome from Wilmer Hale representing Denso. I'm presenting here on behalf of all of the defendants in the trucks and equipment dealer actions within the wire harness product track.

We are here, as you said, on the defendants' objection to Special Master Esshaki's December 15th order denying the defendants' motion to compel documents from Rush Trucks. When the Court noticed this motion to be heard it specified that oral argument is limited to the pass -- to the issue of passthrough. That issue was the subject of a single three-sentence paragraph in Master Esshaki's December 15th order. In that paragraph the Master recited one of the arguments made by the defendants against two particular discovery requests that sought some downstream documents, documents related to downstream transactions or sales by the truck dealers to their customers, and the rationale that Master Esshaki recited from the arguments made by truck dealers was that passthrough is not a defense as a matter of law in the -- in this case, and they asserted a specific reason for that and they said that's because there are no -- there's no class of end payor plaintiffs in this case.

So may in those -- in -- and the Master said he agreed with that, and on that basis he denied those two requests for production on grounds that -- of relevance over

breadth and burden, but it is clearly the only argument he cited was the relevance of this and the availability of the legal defense of passthrough.

So we have here essentially a ruling on a matter of law by the Special Master and on that basis restricting discovery. So given this is clearly a ruling on a matter of law, the critical question, the availability of the passthrough defense to these defendants, the standard of review for this objection is certainly de novo.

This is a critically important issue not just for the wire harness product track trucks and equipment case, but there are five other Rush Trucks truck and equipment dealer actions, and so essentially the Master has made a ruling that could have a broad legal impact on -- across all six of those cases, so it is very important that we get this legal issue right now so that it doesn't affect discovery, which the parties are attempting to coordinate as the Court wants to coordinate across the six truck and equipment dealer cases.

The legal master -- the Special Master's ruling was wrong for three reasons at least. First, as a matter of law the great majority of states that permit indirect purchaser claims, the great majority of those states do not confine the passthrough defense to circumstances in which there either is a risk of claims being asserted by persons or entities or further downstream or the fact -- or a fact of such claims

already having been asserted, so that just the legal proposition, which obviously the Master relied upon, which is no -- no end payor claimants means no passthrough defense, that legal proposition is wrong at least for the great majority of -- under the great majority of state laws that are applicable here. The passthrough defense is, indeed, available regardless of whether or not there are downstream claimants as well.

The second reason why this is wrong is that contrary to what the Master assumed there are, in fact, many claims that have already been filed and asserted by end payors of trucks and equipment, and there is even more so a substantial prospect of many more such claims by end payors of truck and equipment being filed in the future.

Third -- the third basic reason why the ruling is wrong is that the plaintiffs themselves, the truck and dealer -- truck and equipment dealer plaintiffs themself have alleged in their current complaint that they absorbed and did not pass through a substantial portion of the alleged overcharges, and therefore by the very terms of the complaint that we are defending against the plaintiffs have put at issue the fact of whether or not they absorbed versus passed on any overcharge that they have reached, and so the complaint itself makes this discovery highly relevant and the passthrough defense relevant.

So let me first -- we've discussed at some length in the briefs the law, this is obviously state law, about when the passthrough defense is available to indirect purchasers. One case that we cite is the J & R Ventures case out of Wisconsin. That court discussing Wisconsin law I think aptly summed up the principle at work here. It would in that court's words, quote, create anomaly, closed quote, and be, quote, blatantly unfair, closed quote, to allow indirect purchasers to use pass on offensively to create the basis for their claim but at the same time deny defendants to rely on pass on or passthrough defensively, and that just, as the court there said, would be highly unfair to allow one side to use pass on to make their claim but to deny the defendants to use pass on as a way of limiting either showing -- if the entire amount of any alleged overcharge was passed on and there was no absorption by the truck dealers then they have no claim at all, there is no injury and/or -- so that's one way the pass-on defense can work, or it can work to limit damages by subtracting from the amount of damages that they can recover.

So ironically that J & R Venture case from Wisconsin was decided by the very same judge who previously had decided one of the cases that the truck and equipment dealers principally rely upon in their briefs for why pass on should not be available as a defense here. They will -- you

will see in their briefs they heavily rely on a case by the name of K & S Pharmacies, and ten years later that very same judge when she got to the J & R Ventures case recognized that that decision was wrong to the extent that it was a general statement of law, and she said that -- the unavailability of pass-on defense as a matter of Wisconsin law was only with respect to claims by direct purchasers. And so one of their two main cases that they rely upon actually was undone much more recently by the very same judge who said, no, the pass-on defense is available without regard to whether there is downstream claimants.

There are six states, and we laid them out in our brief, that specifically have pass-on statutes providing the availability of the passthrough defense to indirect -- to -- against claims by indirect purchasers, and at least five of those six state statutes make clear that that pass-on defense is available as a general matter regardless of whether or not there are pending claims by further downstream claimants, and those statutes do generally also refer to the goal of avoiding duplicative recovery but it doesn't tie the availability of the passthrough defense to there being currently pending downstream claims by further downstream claimants.

So ultimately when you boil down all of their -- and actually then there are 11 states where the -- that have

statutes which allow claims by indirect purchasers and specify -- usually the language is they specify that the plaintiff may recover either actual damages or damages sustained, and while there aren't judicial decisions interpreting those provisions in all states, there are multiple court decisions which have held those kinds of statutes, the actual damages statutes, or the damages sustained statutes, do implicitly recognize the passthrough defense.

THE COURT: You would need the passthrough in order to determine if there were these actual damages --

MR. CAROME: Exactly, both to determine impact and to -- and for quantification of damages, and often the plaintiffs in these cases argue, well, if anything goes to damages you shouldn't get discovery on it now. In fact, this Court has set up in all of the cases a unified -- it hasn't bifurcated discovery between class-related matters and merits-related matters, so this is our one and only opportunity to do damage-related discovery in the Rush Truck case, and we are not going to get another chance to do it later. So even if it only related --

THE COURT: Or you could argue for class cert -- well, plaintiff has to show damages.

MR. CAROME: That's right. Well, of course they have to, of course they have to, but I'm saying they say

well, sometimes damages -- amount of damages at least they would say well, that's for later after class cert. Well, it is not for later for purpose of discovery, we need it now because we are doing discovery for all purposes now.

So in the face of all the case law and statutes that we have referred to the plaintiffs ultimately cite only two cases questioning or restricting when an indirect -- when a defendant in an indirect purchaser case can -- is denied the passthrough defense. There is the Clayworth case in California, and the California Supreme Court did hold that the passthrough defense is available only where there is a risk, not an actuality but a risk of claims that may be filed by claimants at different levels of multiple layer distribution chains. So at least as to California, yes, we need to -- to have -- the passthrough defense defendants do need to show a risk that there are going to be claims by end payors of trucks and equipment, and I will get to that in a minute.

The other case that they cite is the Kansas case, Cox vs. Hoffman, which denied a passthrough defense to a defendant in an indirect claim, but that case related to a completely different statute in Kansas, it allowed the plaintiff to recover the full consideration paid when there was an overcharge, so not just the overcharge but the full consideration paid and so passthrough wouldn't make sense in

those circumstances. That Kansas statute was repealed before these cases were brought and so that Cox case has absolutely no application here because Kansas now has a statute much like the others where the damages are limited to actual damages and so passthrough is by definition under current Kansas law here. So at most they have shown there is one state, California, where the pose -- where the question of whether there is going to be end payor claims has any bearing at all.

Okay. The second reason why Master Esshaki's ruling is wrong as a matter of law is that he was wrong to assume that there are not claims either pending already or on the horizon with respect to end payors of truck and equipment, and so even under the California test we prevail in passthrough being -- the passthrough defense being available because here, in fact, there are claims already pending by end payors of trucks and equipment and there certainly are a very substantial prospect of additional claims coming forward.

What am I talking about? Well, first of all, the State of Indiana has -- in this MDL in the wire harness track has sued on behalf of the state and its political subdivisions. The scope of that suit is described in paragraph 5 of Indiana's complaint as encompassing what that complaint describes as -- defines as automotive wire harness

systems which are defined as things used or installed in automotive vehicles and motor vehicles or simply vehicles without any limitation to passenger cars. So we already have a case pending in this court where there are end payors of trucks and equipment asserting a claim. Obviously one of the main things that the State of Indiana and its government entities, cities and the like, purchase things like fire trucks, sanitation trucks, garbage trucks, all manner of trucks that they purchase.

So there was a second claim in this MDL again in the wire harness case that was -- that involved claims for -- by end payors of trucks and equipment, that was the public entities claim brought by City of Richmond and four other municipalities around the country which -- now, the class aspect of that case was dismissed but then there was a settlement with four of the five remaining cities around the country, and the complaint in the City of Richmond case asserted claims with respect to -- I'm quoting from the complaint, automotive wire harness systems installed in automobiles, trucks and other vehicles. So that was a case about trucks, there was a settlement, there was monetary payment. The complaint in the City of Richmond case alleged in particular that those cities had purchased vehicles for heavy industrial uses such as fire departments, public works departments, water and waste departments, building

departments and airport functions, so there were a lot of trucks at issue there. The named plaintiffs settled out for money, and there's no reason to expect there aren't going to be similar claims like that coming forward.

Importantly, settlements of claims count as -- even under the California approach of requiring either risk or actual downstream claims, those settlements would account as showing a risk of duplicative recovery.

The State of Mississippi has recently filed a suit, the Attorney General of Mississippi, for wire harness products in state court in Mississippi. That's a suit on behalf of the state and its citizens Parens Patriae. The suit repeatedly asserts that it pertains to automotive wire harnesses that were components of automobiles and other vehicles, so that suit by its term is a suit by end payors of trucks and equipment, other vehicles other than automobiles. And it defines automobile wire harness systems as being, quote, employed in a wide range of products including commercial and individual automobiles, farm vehicles and other vehicles. So we clearly have another case by end payors of trucks and equipment already pending in Mississippi.

THE COURT: When does that case get here, do you think?

MR. CAROME: Pardon me?

THE COURT: When would that case get here?

MR. CAROME: It is in state court, Your Honor. I'm not sure that it ever will.

The State of Florida --

THE COURT: It will once they start looking at it.

MR. CAROME: We will see.

The State of Florida in this MDL in the bearings case, not wire harness but in the bearings case, the State of Florida has sued on behalf of its state, the State of Florida and its governmental entities, and on behalf of businesses and individuals -- individual consumers within Florida. The scope of that suit encompasses what is defined as bearings vehicles which are defined as, quote, vehicles into which bearings were installed. And so there is no limitation in the State of Florida case pending before you to just passenger cars. It is -- that case by its terms defines a much broader scope of vehicles, so there is another end payor of trucks and equipment bringing suit.

The State of California in this MDL -- the State of California has filed suits in five product tracks including two, alternators and starters, in which the trucks and equipment dealers have also brought claims.

The AG's suit pending before this Court on behalf of California and its state agencies, and it -- that complaint alleges specifically, quote, plaintiffs purchased a

substantial volume of automobiles and trucks, another end payor of trucks. And so this is really actually just the tip of the iceberg what has been filed.

The Attorney General of several states, including California, Florida, Washington and Utah, have reached out to one or more of the defendants in the wire harness cases for tolling agreement, tolling the statute of limitations to preserve their ability to bring claims. And a number of defendants, including my client, Denso, have signed such tolling agreements with some of those Attorney Generals.

Indeed, even though the California Attorney General has not yet filed a suit in the wire harness products track, representatives of the California Attorney General's Office have been attending depositions of defendants in these cases. Now, as I said, there is going to be -- there is likely to be unfortunately a significant number of additional states coming forward, that's exactly what happened in the LCD case, another large antitrust MDL. There were, I believe, 14 different states ultimately came forward in those cases to file claims, so we are going to have a substantial number of claims by government entities, government entities have already alleged that they are purchasers of trucks and equipment, end payor purchasers of those, so we will have no shortage of those unfortunately. So there is -- actually we already have such claims, and there is a risk of more claims

coming down the pike.

In fact, we have looked at Rush Trucks' data, its own purchase and sale data has been produced to defendants, and actually we see that within that data Rush Trucks has itself sold trucks and equipment to at least three of the states that have secured tolling agreements from defendants. In California there are Rush Truck sales to Los Angeles, San Diego Fire Department, and City of Bakersfield. In Florida, the Rush Trucks' data shows there are sales by Rush Trucks to the City of St. Petersburg. In Utah, data shows that there have been sales by Rush Trucks to the Salt Like City corporation, the Salt Lake City Public Utility Department, the Salt Lake City School District, which obviously would include a purchaser of buses, which are not passenger vehicles.

They would also show purchases by cities in other states in which Rush Trucks or truck dealers are bringing claims. There are -- Rush Trucks' data shows that the City of Phoenix in Arizona have purchased trucks from Rush Trucks. Albuquerque, New Mexico, Charlotte, North Carolina, Nashville, Tennessee. There are tons of trucks being sold to government entities. Government entities are still -- there is a substantial prospect they are going to come forward and in some cases they already have.

So, in addition, there are large purchasers of

trucks -- private purchasers of trucks and equipment who may well still come forward and bring claims not as a matter of -- just on their own behalf without being classes or they may opt out of the class, and so the -- there is -- there is a substantial prospect even from private entities of future claims by end payors of trucks and equipment. So even if there was some need -- even if the passthrough defense did depend on a risk of duplicative liability to end payors, we have got that in spades here.

Lastly, just another -- just another point, even in cases where the passthrough defense is not available, courts have held that discovery regarding downstream activities by the plaintiff even in direct purchaser cases for example are relevant to class certification issues including adequacy and typicality, there can be circumstances where the way that a particular plaintiff sold vehicles. Say if it always sold them for a certain percentage above acquisition cost -- well, actually in those cases that plaintiff was arguably benefiting from any overcharge and would not be an adequate or typical class representative. So even if you had to get past all the law that says we are entitled to the passthrough defense, the discovery here would be important and relevant so --

THE COURT: Let me ask you this question, it is going to a different subject -- well, not a different

subject, but in looking at what you are asking for in discovery it does look like -- to answer the questions that you have asked and to get the information that you seek, it looks like you are asking for everything. I guess my question to you is what are you not asking for of Rush Trucks?

MR. CAROME: I don't think we are asking for everything by any means, Your Honor. I would say this, I think what this objection is really about is correcting a legal error made by the Special Master. I think if there are questions -- and he ruled that this discovery was simply off the table entirely as a blanket matter.

THE COURT: Well, let's say it is on the table, how can we limit it? It just seems -- I'm looking ahead, so if I should rule that it is on the table, how do we do this in a way that doesn't -- that isn't burdensome? I know we haven't gotten to that -- we haven't talked about that issue but I can't help but think about it as you speak.

MR. CAROME: I would suggest that if Your Honor does what I think it should do and reverse Master Esshaki on this legal ruling that you suggest that he mediate a discussion between the defendants' counsel and Rush Trucks' counsel to see if we can work out boundaries that will solve any overbreadth concern.

THE COURT: Okay. Thank you.

MR. CAROME: Thank you.

THE COURT: Thank you very much. Plaintiff?

MR. SPERL: Good afternoon, Your Honor. May it please the Court, my name is Andrew Sperl with Duane Morris. I represent the truck and equipment dealer plaintiffs.

I'm going to address the issues in the same order they were presented by the defendants, but before I get into that I would like to indicate our agreement with the point that Your Honor made, which is that these requests are extremely broad, extremely expansive as they are written, and I know that the order setting the hearing directed us not to necessarily get into burden and overbreadth arguments but those are very real concerns.

I would point out two things in relation to that. One is that in determining whether requests are appropriate, relevance is balanced with burden and so that is why the marginal relevance of some of these requests, the marginal relevance of this downstream discovery is important. And secondly, to keep in mind, and we have gone into this in the brief so I'm not going to read off the list of requests for which we have agreed to produce documents because those are in our briefing and you can see that we have agreed to produce substantial discovery, particularly on our pricing, which I think is some of the downstream discovery that the defendants are interested in.

And as defendants just acknowledged, we have produced transactional data. In fact, I may be getting the timing mixed up but I think that data production is even more fulsome than it was when the briefing was started. We have produced our entire unredacted database of purchases and sales of trucks during the period that we maintained that, which goes back -- I don't remember the exact date but it goes back a number of years.

So to the extent that defendants need data to run regressions to calculate things like damages or passthrough, they have that data. To the extent that they need to test the theory about whether or not we are selling product at some markup over our costs, you know, they have that data, they have documents that relate to our pricing, and so this discussion about these requests, and I will turn to the passthrough issue that Your Honor directed us to focus on, but I did want to put that in the proper context before I get into those legal issues.

Dealing first with the legal issue of whether or not downstream discovery as a matter of law is discoverable in a case like this. I would submit that, first of all, as Your Honor is aware, these are state law claims for which we are seeking damages and as such this is a state law issue, whether or not there is a passthrough defense and whether or not plaintiffs need to affirmatively prove a lack of

passthrough in order to show antitrust injury under those state laws.

THE COURT: So you do agree that it is a legal issue and therefore a de novo consideration by this Court?

MR. SPERL: Your Honor, on the one hand I would say under the rule, Rule 53 -- I don't have the sub point that governs this, issues are divided or issues are denoted procedural issues, and we have cited case law that says discovery issues are procedural issues, and I don't believe in their reply the defense have cited case law identifying discovery issues as other procedural issues, and so other --

THE COURT: Well, what the defense is is a legal issue, not a procedural issue, right?

MR. SPERL: Right, and that --

THE COURT: When you get down to it, I know what you want but that particular issue seems to me to really weigh heavily on the legal side rather than a procedure.

MR. SPERL: Your Honor, we are cognizant of the importance of that legal issue, and I would submit that under a de novo review of that particular legal issue that we would prevail on that as well even under de novo review. And I would, and I think Your Honor recognizes this, that the issues of burden and overbreadth in the other determinations that the Special Master made, those would clearly be discretionary -- abuse of discretion standard.

With regards to the legal issues, the fact is these are state law claims and the issue of the passthrough defense is going to be a state law issue, and there is very little authoritative case law interpreting the statutes of these states. For instances we just heard about a Wisconsin trial court decision where holding a particular way, you know, those decisions -- even decisions of other federal courts trying to construe state law are not binding and authoritative here. And, in fact, other than the California decision, the Clayworth decision, which I understand is only authoritative with respect to California law, I'm not aware of any other state high court decision that construes these state statutes. And so what we are asking Your Honor to do in this case is to look at this competing authority, and there is competing authority which both sides have cited, and to pick what is the better rule and to pick what is the most well reasoned rule because certainly for a lot of states it is an issue of first impression and even for the other states there is not authoritative case law.

THE COURT: What if I accept the different state rules, I mean, because the state made the determination, what do we do then? Would it be if we accept that California allows this do we allow discovery on cases from California? I mean, do we distinguish where people purchased their vehicles, do we do it that way?

MR. SPERL: Well --

THE COURT: Or do we just come up with a common rule for all states?

MR. SPERL: Well, first of all, Your Honor, if I could say just to clarify, I think the only way the states have spoken on this are either state court decisions, which I have just talked about, there are not very many authoritative state court decisions, and in the words of the statutes themselves. Regarding your question what do we do, for instance, if we decide that in California as the Clayworth court decided, and there shouldn't be any dispute on what California law is because of that decision, what if we decided in California there is no passthrough defense, but in some other state if Your Honor were to come to the conclusion that there is the possibility of a passthrough defense, even whereas I would submit here there is nothing other than a speculative chance of duplicative recovery, that may be a situation where possibly we could confine discovery to a particular state, there might be a way to do that. You know, I think that even confined to a particular state to a particular dealership you would still run into the overburden and overbreadth arguments. But as matter of law, I think you could say discovery relevant to truck and equipment sales in such and such state, and then we would have to work out the mess of how to conduct that discovery and whether even that

request so limited is overly broad and unduly burdensome.

As I mentioned, to the extent the states have spoken about this at all, it is in lower court decisions, it is in the Clayworth decision and in the words of the statutes themselves. Defendants have suggested in their briefing that under the words of the statutes there is always going to be a passthrough defense provided because, first of all, some statutes use terms like actual damage or damages sustained. I would argue, first of all, in the absence of state law construing what those words mean, there is not an authoritative source for you to look at, and again you have to look at the better rule.

If you look at Hanover Shoe, I believe that the federal antitrust statute refers to damages sustained, and in that case of course the court held that antitrust injury was suffered at the time the overcharge was paid by the direct purchasers. I realize that this is a different situation because following Hanover Shoe came Illinois Brick, which was the solution to this problem we have of how is it that a passthrough defense isn't available and yet the indirect purchasers can also have a cause of action.

The Supreme Court solved that in a particular way in Illinois Brick, that doesn't mean that's the only way that has to be solved, and if you look at the Clayworth decision it acknowledges that fact and acknowledges that you can have

a rule that recognizes as in Hanover Shoe the antitrust injury is suffered at the time of the overcharge but still provide for an indirect purchaser cause of action and yet somehow prevent the risk of duplicative recovery. Clayworth didn't go into all the details about how to prevent the risk of duplicative recovery, but it acknowledges where there is a real risk of duplicative recovery then a passthrough defense would be allowed.

Before I move on I would also like to note, one of the reasons we rely so heavily upon Clayworth, besides the fact that it is the only authoritative state court decision that I'm aware of, when I say that I say that from the state high court, is that it is a particularly well-reasoned decision, it goes into the rationale of its decision, the policy considerations. One of the points that we have heard from defendants in their briefing is that to allow what we are proposing would be fundamentally unfair because you could have indirect purchasers recovering some sort of windfall by being able to claim for damages, but even if those damages were passed on to a nonparty, you know, someone lower in the distribution chain, I would submit there is a competing policy consideration.

The purpose of the antitrust statutes is to promote competition, it is to punish violations of those statutes, it is to disgorge wrongfully gotten profits that were made in

violation of those statutes. So if you are presented with a risk on the one hand of a plaintiff, a victim of the antitrust conspiracy, recovering more or on the other hand defendants not being liable for the full damages that they have caused, I will submit that the policy of the antitrust laws would favor erring on the side of over recovery to go promote its aims.

I mentioned that there are two ways that states have spoken on this. One is through limited judicial decisions, the other is through the text of the statues themself beside those statutes that refer to actual damages, damages sustained, which, by the way, I would note damages sustained is the language from the Cartwright Act as well. In addition to that language in the statutes, some statutes do provide for by statute a passthrough defense, but in every one of those statutes which defendants have identified, and those are the only ones I am aware of it, it says to the effect of -- there's language that says to prevent duplicative recovery. That language would be mere surplusage in all of these statutes if that defense were always available where there is no risk of duplicative recovery. I will also note that in those states where there are such statutes, those are the same states in which defendants are arguing that plaintiffs have to show a lack of passthrough initially to show that there has been actual damages. Those

states also use the terms actual damages in their statutes. If that were true it will be unnecessary to have a separate defense for passthrough in those states, and the entire language of the passthrough defense in those states would be your surplusage.

Your Honor, the defense have also suggested that in this case there is actually the possibility of duplicative recovery, and I believe that in defendants' brief they were focused on Mississippi and Indiana. There were a couple of other sources and complaint mentioned in argument that I haven't studied as carefully. We have described in our brief why the Mississippi and the Indiana claims do not create a real risk of duplicative discovery. I would note in general with respect to this argument a few things. First of all, where there are references to automotive wire harness, to automotive vehicles, I would suggest that those do not refer to the types of heavy trucks and heavy equipment that are sold by the dealers in our punitive class. We were careful in tailoring our complaint to make it clear what it was that we were complaining about. And the fact that I don't believe that these entities are actually pursuing those claims I think is also evidenced by the fact that they haven't sought out as far as I know discovery specific to trucks and equipment.

As far as I know, and I am careful with this

representation because, as I mentioned, I haven't studied all of these complaints, I don't -- I'm not aware of allegations in those complaints that are specific to the market for trucks and equipment as we have alleged in those complaints that we currently have before this Court. And the fact of the matter is, as defendants made the point on the earlier motion today and as they argued in their motion to have our cases dismissed, they would argue that there has been some knowledge around the edges at least of this conspiracy for a while and no one has filed claims other than these few, which, as I have mentioned, are distinguishable. There is not the rush of claims having been filed for our particular class, most of the claims that they have filed have been automobile claims. And I would suggest that under Clayworth it is not enough that there merely be some speculative chance, it has to be a real possibility of duplicative recovery for there to be a passthrough defense.

In their briefing defendants also suggested that documents responsive to the requests at issue are relevant for other issues other than establishing a passthrough defense or damages. However, if you look at their briefing there is really only one specific example that they have given of why this may be relevant, and that is on the issue of adequacy. Defendants have suggested that perhaps Rush Trucks may be differently situated than other plaintiffs and

have a conflict with other plaintiffs in the punitive class because we somehow benefited, for instance, by not having to -- by selling our goods at some markup over the cost that we paid for them and that would situate us differently.

Going back to my initial point, we have given defendants and agreed to produce more than enough information to test that limited theory. We have given them all of our data, we have given them documents, we have agreed to produce documents that relate to pricing, so if that's the only theory, and as I read their papers that is the only specific theory that I know of other than passthrough, why this information is relevant, they have that.

THE COURT: What information exactly did you give them, the price and what else, what other documents?

MR. SPERL: So our database is -- we have two databases that our client maintains, and as you know there are multiple individual plaintiffs that are all affiliated with one parent company and the parent company maintains the database that they all use, just as background. There is one database that has information on acquisitions of trucks, and there is another database that has information on sales of trucks. I don't have all of the fields for those databases in front of me, but there are price terms in the databases, there are other financial terms, certain types of discounts from the OEM, there is a field in there for that. There's

probably hundreds of fields in the databases not all of which necessarily are going to be relevant, but we have provided defendants with complete and unredacted versions of that.

With regard to documents --

THE COURT: What other documents would you have? I know this is going to the first part but I'm just curious as to what would you have --

MR. SPERL: Well --

THE COURT: -- that you are not giving?

MR. SPERL: On the one hand I will let defendants speak more for themselves in terms of what they think they need to prove. Documents which would be in the category of things that are being sought which are overly broad would be things like -- I believe one of the requests at issue relates to all documents relating to RFQs.

THE COURT: To what?

MR. SPERL: RFQs, so request for quotation, maybe RFPs, request for proposals.

THE COURT: Okay.

MR. SPERL: But the definition of relatedness and the definition of RFQ are so broad that if any customer sent an e-mail to any of our salespeople and said I'm interested in buying a truck, you know, that's related to an RFQ, could you give me a price on X, and we have to go through all of the e-mails of all of our salespeople one by one to get that.

So, I mean, that's in the category of things we would object to.

I would also note, and I suspect this is because the Special Master maybe didn't apply this rationale to request 8, but I think request 8 would be in the same category, which is basically all the communications we have had with our customers.

Examples of documents which we would have and which we have agreed to produce, those are set out in our brief. I don't remember all the categories, I know a lot of them related to pricing I believe but in our brief is a bullet-point list -- a couple of lists of the requests for which we have agreed to provide responsive documents.

THE COURT: Okay. Thank you.

MR. SPERL: Thank you.

THE COURT: Response?

MR. CAROME: Just a couple of very brief points, Your Honor.

First, I hear plaintiffs relying solely on this one case in one state, California. Just so it is very clear what the rule is there, I will read a quote from that case. The -- so even in California under Clayworth the question is not whether claims by downstream claimants have already been filed, which is apparently what the Special Master assumed, but whether there is, quote, a risk that they may be filed.

Exactly where a risk remains that multiple purchasers may sue, the bar on consideration of pass-on evidence must necessarily be lifted. That's even under their best -- under their very best case, and that's only for one state. And so I didn't hear much to suggest that there is not going to be a flood of additional suits by AGs including suits for trucks and equipment.

In the LCD panel case the Attorneys General -- none of the Attorneys General even stepped forward to file suits until after a class certification decision had not just been made but subject to an interlocutory appeal and affirmed by the 9th Circuit. It was after that point, four years into the case, that the first AG stepped forward in those cases and ultimately --

THE COURT: Really, I didn't realize that.

MR. CAROME: Ultimately there were 14 states that stepped forward after that point in time. So we are at a quite early stage actually when it comes to the Attorney General, so it is very likely -- as I have said, there have been a number of Attorney Generals reaching out to defendants for tolling agreements and the like, so there is more than a substantial risk of suits by -- which would present the problem of duplicative recovery even if that were the rule, which as far as we hear here today that's really only the case in California.

We are at the discovery stage in this case. It would be a very dangerous thing for this Court to narrow discovery now and build into not just the wire harness' trucks and equipment case but all of the trucks and equipment cases what would become a reversible error down the road if this discovery were denied. And so clearly the safe course to keep this case on track to avoid doing a lot work and then having to redo it again because the discovery was unduly narrow at the front end, the safe and smart thing to do is to allow this discovery and not rely on this erroneous legal ruling.

Thank you, Your Honor.

THE COURT: Thank you. Okay. I think that takes care of it. The Court will issue an opinion on this hopefully soon.

Is there anything else while you are here?

(No response.)

THE COURT: No. All right. We will see you at the meeting in May.

MR. CAROME: Thank you very much, Your Honor.

MR. SPERL: Thank you, Your Honor.

THE LAW CLERK: All rise. Court is adjourned.

(Proceedings concluded at 1:16 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Automotive Parts Antitrust Litigation, Case No. 12-02311, on Tuesday, March 15, 2016.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 03/24/2016

Detroit, Michigan